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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE STATE OF COLORADO,

Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,

Defendants.

THE STATE OF COLORADO'S REPLY TO BRIEF OF AMICI CURIAE

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The State of Colorado respectfully submits the following reply to the Brief Amici Curiae of Kaiser Steel Corporation, Phelps-Dodge Corporation, Vermejo Park Corporation and Vermejo Conservancy District in Support of the Position of the State of New Mexico (hereinafter sometimes referred to as "Amici Brief").

I. AMICI HAVE MISUNDERSTOOD THE LAW OF EQUITABLE APPORTIONMENT

Going to the core of the argument presented by the Amici Brief, Colorado perceives three basic allegations of the Amici with respect to the Report of the Special Master:

1. The Special Master erred in examining actual water usage in New Mexico rather than relying upon decreed rights listed in the 1941 Vermejo River Decree, the 1949 "Vermejo Project Report" and the 1952 "Definite Plan Report" for the Vermejo Conservancy District.

2. The Special Master erred in concluding that an award of 4,000 acre feet of water per year to Colorado from the Vermejo River system, with the remainder to New Mexico, would be equitable.

3. The Special Master's failure to allocate water on the basis of priority dates constituted a misapplication of the law of equitable apportionment.

All three allegations attempt to reinforce the basic premise of Amici's (and the State of New Mexico's) theory of this case: the priority dates of the water claimants should be the only factor determining the allocation of water. However, this Court has not subscribed to such a position, and instead has adopted the doctrine of equitable apportionment to resolve interstate water disputes. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

Amici urge that as between Colorado and New Mexico this Court should strictly apply the prior appropriation doctrine. They contend that ". . . the rule of equitable apportionment is the rule of prior appropriation . . ." (Amici Brief, p. 8). However, in equitable apportionment suits this Court does not rely solely on the prior appropriation or riparian doctrine, or on the water laws of a particular state. Rather, it has considered each case individually, with due regard to the multitude of factors which contribute to a fair allocation of water from an interstate system. *Nebraska v. Wyoming*, 325 U.S. at 618. As this Court stated in *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931):

> For the decision of the suits between States, federal, state and international law are considered by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. *Kansas v. Colorado*, 185 U.S. 125, 146. As was shown in *Colorado v. Kansas*, 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equality shall be applied having regard to the "equal level or plane on which all the states stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending states and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters. *Wyoming v. Colorado*, 259 U.S. 419, 465, 470.

Subsequently, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court stated:

> . . . [S]ince Colorado, Wyoming, and Nebraska are appropriation States, the principle would seem to be equally applicable here. . . . But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. . . . Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interest which must be made.

For these reasons the Special Master did not misunderstand the doctrine of equitable apportionment when he concluded that:

> The equities of these cases require that the Master consider many factors, not just the law of the States involved. Thus, although appropriation is an important factor to be considered, the Master must also consider other factors such as whether or not there is "real or substantial injury or damage."

Report at p. 14.

The Special Master correctly understood that this case could not be resolved solely on the basis of prior appropriations and that his primary task was an examination of all of the equities of the case.

When this case began, the State of New Mexico argued that Colorado could not be awarded any water because any allocation to Colorado would be contrary to the doctrine of prior appropriation and would not protect the "existing economies" in New Mexico. Apparently as a result of the Special Master's finding that "existing economies" in New Mexico would not be affected by a diversion of 4,000 acre feet of water per year in Colorado (Report, p. 23), Amici (and New Mexico) now have narrowed their argument to state that the law of prior appropriation is the law of equitable apportionment. Amici refer to a federal common law doctrine of priority of appropriation (Amici Brief, p. 7). The only federal common law of water allocation between states is that of equitable apportionment. *Kansas v. Colorado.* Priority of appropriation is solely a state law concept. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

To buttress their position Amici cite numerous cases involving water disputes between private litigants (Amici Brief, p. 20), cases in which the prior appropriation doctrine was deemed applicable. Significantly, not one of the cases cited by Amici is an equitable apportionment action resolving the respective rights of states in an interstate stream.[1]

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[1]The federal district judge hearing *Kaiser Steel Corporation v. CF&I Steel Corporation*, No. 76-244 (D. N.M. 1978), expressly stated in a letter to counsel that the principles of equitable apportionment did not control the case, involving as it did only private litigants. See Reply Brief of the State of Colorado at 71.

With two exceptions, the parties to the cases cited by the Amici were private claimants residing in different states, who sought either to quiet title to their water rights or to enjoin competing diversions or changes in uses.[2] The predominant issue in all of these cases was not the priority of water rights or the equity of the water allocation, but the jurisdiction of courts and the authority of state officials to grant relief that would affect the rights of water users residing outside the boundaries of the state where the action was brought.

The doctrine of equitable apportionment, not prior appropriation is the law governing interstate water allocation, because equitable apportionment recognizes the real and substantial interests of both states in an interstate stream, which interests must be reconciled upon consideration of all relevant factors and equities. *New Jersey v. New York*, 283 U.S. 366 (1931); *Nebraska v. Wyoming*. By contrast, if Amici's position were accepted this Court would decide this case solely upon the priority dates of the various water claimants, without regard to any other facts. Allocating water of the Vermejo River based strictly upon priority dates without an examination of all of the equities would be highly unfair in this case, because the priority dates of the water claimants do not:

1. Take into account that New Mexico's users either do not need or do not efficiently use the full measure of their decreed rights;

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[2]The United States initiated the action to quiet title and restrain diversions in *United States v. Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935). There, however, the court merely observed that the government's water rights in Nevada, just as those of any other user, were to be adjudicated and administered according to Nevada's law of appropriation. *Id.* at 167. Furthermore, the parties stipulated that appropriation principles should control the disposition of their claims. *Id.* at 168. And, *Arizona v. California*, 373 U.S. 546 (1963), as Colorado has repeatedly noted, concerned neither equitable apportionment nor prior appropriation; that case required an interpretation of the Boulder Canyon Project Act.

2. Consider the extent to which New Mexico's users engage in wasteful practices or how waste might be eliminated and the common supply conserved;

3. Show that administration of the Vermejo River in New Mexico encourages inefficiency and does not promote conservation;

4. Recognize that the unregulated and proliferating water detention dams, stock water ponds and fishponds along the Vermejo River seriously deplete the available supply;

5. Recognize that New Mexico seeks to reserve the waters of the Vermejo system for future development in New Mexico;

6. Take into account the dire need for water in Colorado or the fact that while Colorado contributes approximately one-half of the flow of the Vermejo River it is presently enjoined from making any use of its own water.

7. Reflect the differences in the substance and application of the prior appropriation doctrine in Colorado and New Mexico;

8. Consider that Colorado's diversion of 4,000 acre feet per year from the Vermejo River will not materially affect the existing economies in New Mexico.

Just as the above factors were properly before the Special Master in this equitable apportionment proceeding, a recent case from the Ninth Circuit shows that even under a strict application of the priority doctrine between private litigants, certain of the above factors must be taken into account. In *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286 (9th Cir. 1981), the United States and the Pyramid Lake Pauite Tribe of

Indians brought an action to quiet title to water rights to sustain a lake fishery. The Truckee-Carson Irrigation District ("T.C.I.D.") asserted that its water rights decree was *res judicata* on the issue of water rights in the stream, contending that a water right for fishery purposes would deprive it of water which it had been previously decreed. The Court of Appeals disallowed the defense of priority of appropriation, noting the equitable considerations mitigating the potential effects of the decision:

> We realize that this judgment results in hardship to T.C.I.D. and its members. However, this is mitigated by several factors. First, T.C.I.D. obtains water from two rivers, the Carson and the Truckee. Even if the Tribe succeeds in establishing its entitlement to substantial additional Truckee River water, it is possible that much of the T.C.I.D.'s need could be satisfied by Carson River water. Second, the Newlands Project is relatively inefficient in its use of water. See *Pyramid Lake Tribe v. Morton, supra*, 354 F. Supp. at 257. Improvements in water storage and distribution could result in substantial efficiencies to ameliorate any hardship to T.C.I.D. . . .

649 F.2d at 1311.

The analysis of the Court of Appeals bears a striking similarity to certain equitable factors presented by Colorado. The Vermejo Conservancy District can substantially improve its water distribution system and derives at least thirty percent of its water supply from the Chico Rico River, which will not be affected by the case at bar (Tr. 1303, 1564). *See also Colorado v. Kansas*, 320 U.S. at 398-399.

Amici urge the most rigid application of the priority of appropriation doctrine. The system they propose

would not take into account the equitable factors listed above or the factors considered in the *T.C.I.D.* case.[3] Amici, like New Mexico, seek to avoid an examination of what is fair and equitable. Yet, this Court ordered that the Special Master hear Colorado's and New Mexico's evidence regarding the equitable apportionment of the Vermejo River. Having heard the facts, the Special Master saw the inherent unfairness of the present division of the Vermejo River under which New Mexico neither presently requires nor properly uses the entire flow of the River but nonetheless has enjoined any diversions in Colorado. Had New Mexico or Amici proven a present beneficial use of the entire Vermejo, had they shown that any Colorado diversion would be "disastrous" to Amici, this might be a different case. What was proven at trial was quite different, however, and the Special Master awarded water to both states, recognizing that such an allocation would not materially affect uses in New Mexico and would not injure "existing economies" in New Mexico (Report, p. 23).

In short, Amici argue that even though New Mexico appropriators will not be materially affected, even though Colorado sorely needs a portion of the water which it contributes to the Vermejo River system, and even though New Mexico will continue to receive the lion's share of the annual production of the Vermejo River, the Report of the Special Master is unfair. A review of the record speaks to the contrary.

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[3]Even under a proper administration of the priority system, Colorado should be allocated water because under such administration as is the case in Colorado, certain New Mexico rights or portions thereof would likely be declared abandoned, surveillance of the amount of water diverted in relation to land irrigated would occur and there would be a concern for waste and beneficial use. (Tr. 521, 523-29, 563-65, 593). C.R.S. 1973, §37-92-502.

II. ACTUAL NEED AND BENEFICIAL USE, RATHER THAN DECREED RIGHTS, SHOULD BE THE BENCHMARK FOR AN EQUITABLE APPORTIONMENT OF THE VERMEJO RIVER.

Amici's assertion that decreed, paper rights contained in the 1941 Vermejo River Decree (Colo. Ex. 25) and projections regarding the Vermejo Conservancy District found in the "Definite Plan Report" should control (Colo. Exs. 17, 18 and 19), and Amici's contention that the Special Master's allocation of Vermejo River water is inequitable, derive from the posture that the State of New Mexico and Amici have taken throughout this case.[4] That is, Amici resent an inquiry into the extent and nature of New Mexico's actual usage of Vermejo River water. Amici in their Brief, like New Mexico in its Brief in Support of Exceptions, seek to limit the scope of this Court's inquiry to documents which do not reflect the realities and extent of New Mexico's uses. However, this Court ordered the Special Master to receive evidence and make his recommendations for an equitable apportionment. Amici wistfully here argue that the evidence and the Master's Report should be ignored.

The Special Master engaged in "[a] thorough examination of the existing economies in New Mexico . . ." (Report, p. 23). The evidence in the record proved the following facts regarding those economies and their uses of Vermejo River water:

(a) That the first diverter in New Mexico, the Vermejo Park Corporation, has not irrigated the full amount of acreage which it may irrigate, even though an average of 8,400 acre feet per year of water

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[4]The attorneys for Amici Curiae were present at the trial, and the attorney for one of them, the Vermejo Conservancy District, was a Special Assistant Attorney General for New Mexico during the trial and briefing before the Special Master (Tr. 3, 4).

passes its headgate (Colo. Ex. 5) and even though New Mexico's State Engineer admitted that Vermejo Park could have irrigated more acreage (Tr. 2427);

(b) That although water is available, Kaiser Steel Corporation does not have a present need for or use of the full amount of its decreed rights, and that its use has actually decreased since 1976 (Tr. 1725-1727; Colo. Ex. 6, Tbls. 1 and 2);

(c) That Phelps-Dodge Corporation cannot use all of the water available to it under the first priority on the River, and has leased a portion of its water rights to Kaiser to avoid having a portion of its rights declared forfeited or abandoned (Colo. Ex. 51; Brief in Support of Exceptions of the State of New Mexico, p. 27; Colo. Ex. 6, pp. 6-7);

(d) That undecreed uses for water detention, stockwater and fishpond structures seriously deplete the supply of the River (Colo. Exs. 37, 38, 40, 43, 44, 45 and 48);

(e) That the Vermejo Conservancy District is extremely inefficient in its use, and is made up of parttime farmers who could avoid any adverse effects of a diversion in Colorado by installing a closed stock watering system for which funds are available (N.M. Ex. E-3; Colo. Exs. 69, 70); and

(f) That New Mexico's administration of the Vermejo River is so inefficient that there is no surveillance of the amount of water diverted in relation to the land irrigated (Tr. 1071, 1072, 1099, 1111-1115) and that Phelps-Dodge can divert in one month the amount of water to which it is entitled in an entire year (N.M. Ex. A-130).

What these facts show, and what Amici would have this Court ignore by urging total reliance upon decreed

rights rather than upon actual conditions, is that decreed rights bear little relation to the realities of actual appropriation. Based in part upon the facts outlined above the Special Master was able to conclude that there would be no material affect on New Mexico users downstream and that the benefit of a Colorado diversion would outweigh any detriment to New Mexico.

What Amici and New Mexico argue for is a preservation of a *status quo* on an interstate stream by denial of a right to divert water to a state which contributes approximately one-half of the water to that stream. That result would be inequitable in the extreme, would encourage wasteful use and reserve water for hypothetical and future uses in New Mexico at the expense of present, actual need in the State of Colorado.

III. AMICI'S SPECIFIC OBJECTIONS ARE NOT WELL-TAKEN AND DO NOT AFFECT THE VALIDITY OF THE SPECIAL MASTER'S REPORT.

The first eight pages of Amici's Brief purport to discuss the irrigation and industrial rights of the various New Mexico users. In this entire discussion, there is not one reference to the evidence presented at trial. The reason for such an omission is that Amici's discussion of the rights of the New Mexico users does not take into account the actual usage on the Vermejo, but rather looks only to the various decrees.

Beginning at page 8, Amici argue that the Special Master's Report uses an incorrect basis for determining the amount of available water in the Vermejo River system. Ironically, Amici criticize Colorado for employing "average flows" in its hydrologic data (Amici Brief, p. 14), but cite as evidence of the District's alleged shortage two New Mexico Exhibits, F-22 and F-37, which employ annual averages. Neither New Mexico Exhibit F-22 nor New Mexico Exhibit F-37 accurately

reflects the amount of water available to the District. Both exhibits merely reflect the amount of water applied by the District to its fields, and do not show the amount of water which was available at and diverted through the District headgate. In other words, New Mexico Exhibits F-22 and F-37 reflect only about one-third of the water which was actually available to the District, the remaining two-thirds of the water being lost en route to the fields (Colo. Exs. 69, 70).

The answer to Amici's criticism of the Special Master's use of average flows is twofold. First, yearly and monthly averages were accepted by *both* Colorado and New Mexico as the most accurate way of representing the actual flow of the Vermejo River. Both Colorado and New Mexico used yearly averages in many of their tables (Colo. Exs. 5, 6, 69, 70; N.M. Exs. F-4 through F-20, F-29, F-37). Colorado also used monthly averages to show the available supply in the Vermejo River system (Colo. Ex. 5, Tbl. 2). While other methods for computing the available and dependable supply of a river may exist, the Special Master had excellent dependable supply evidence before him, which was utilized by both parties and which consisted of flows computed on a monthly and yearly basis.

Second, New Mexico's principal hydrologic witness, Mr. Mutz, admitted that the Vermejo Park Corporation, Kaiser and Phelps-Dodge would be minimally affected, if at all, by Colorado's diversion (Tr. 1323, 1379). Thus, the question of whether the use of average flow to determine available supply was appropriate is important only in light of the Vermejo Conservancy District. Because the Vermejo Conservancy District has an extensive reservoir system, the express purpose of which is to regulate and even out the low flow and high flow years (Tr. 1298), use of averages in determining available and dependable supply is most proper with regard to the District. Colorado Exhibit 17, the "Vermejo Project Report" for the Vermejo Conservancy District,

uses average flows as a gauge for determining the amount of water available for the District. With the District's ability to capture water and store it from month to month, or even year to year (N.M. Ex. F-37), use of monthly or yearly flows was a highly appropriate means of estimating the amount of water which the District could divert and store, hence its dependable supply.

Amici urge that a diversion of 4,000 acre feet annually by Colorado would be ". . . most of the dependable flow" of the Vermejo River. This contention is unsupportable. The Special Master concluded that Colorado's measurements of the Vermejo River flow, consisting of actual stream flow measurements, were more accurate than New Mexico's altitude-runoff estimate to show Colorado's contribution to the Vermejo system (Report, p. 4). He also determined that Colorado's measurements were probably low, because they did not include the production from one of the Colorado tributaries to the Vermejo River (Report, p. 3). These figures show that Colorado contributes over 8,400 acre feet of water per year to the Vermejo River (Report, p. 3; Tr. 2527, 2528; Colo. Ex. 5). During the same period of measurement, and after depletions by upstream users in New Mexico, over 11,000 acre feet of water flowed past the Dawson gauge (Colo. Ex. 5, p. 4). Thus, Colorado would take less than one-half of its contribution to the Vermejo River system, and only about one-fourth of the virgin flow and dependable supply in the Vermejo River. Amici therefore overstate the impact of Colorado's diversion.

Amici also appear to take the position that a "dependable supply" is equivalent to the lowest recorded flow of the Vermejo River over an extended period of time. Using the lowest recorded flow as a measure of dependable supply would be as inaccurate as using the highest recorded flows to prove availability. See *Wyoming v. Colorado*, 259 U.S. at 484.

At pages 10-13 of their Brief, Amici argue that the Special Master did nothing to protect the existing economies along the Vermejo River, but rather based his award upon some sort of economic evaluation of the viability of the Vermejo Conservancy District. The Special Master's conclusion that the Vermejo Conservancy District ". . . should have never been built . . ." merely reflects the conclusion advanced at trial by New Mexico's witness from the United States Bureau of Reclamation (Tr. 1586). Contrary to Amici's argument, the Special Master did not engage in an economic evaluation of the District or attempt to justify the "obliteration" of the District (Amici Brief at p. 9). The Special Master did just the opposite. He examined existing conditions in the District and along the Vermejo River, examined water availability to those users over a period of time and concluded that existing uses along the Vermejo River could be satisfied notwithstanding an award of 4,000 acre feet per year to Colorado. The Special Master states at page 23 of his Report:

> It is the opinion of the Master that a transmountain diversion would not materially affect the appropriations granted by New Mexico for downstream users. A thorough examination of the *existing economies* in New Mexico convinces the Master that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado.

(emphasis added).

While the Special Master's Report may not recognize the full extent of paper rights along the Vermejo River, it does take into account actual impacts on "downstream users" and "existing economies" and concludes that they can be accommodated under an award of water to Colorado.

Amici contend that the Special Master also gave "short shrift" to the rights of the Phelps-Dodge Corporation, the Vermejo Park Corporation and Kaiser Steel Corporation (Amici Brief, p. 13). Their complaint is based upon the fact that the Master did not recognize the full decreed rights as the actual usage of those water claimants. While Amici complain that the Master did not recognize the full extent of the decreed rights, they do not provide a reasonable explanation of why at present, when there is no Colorado diversion, most of them have not used the full measure of their rights even when water has been available (Colo. Exs. 68, 69; Tr. 2174). The State of New Mexico, in its Brief in Support of Exceptions at page 27, and in a rare moment of candor, admits that Phelps-Dodge leased 400 acre feet of water per year to Kaiser Steel Corporation in order to avoid a forfeiture of that right. Obviously, Phelps-Dodge is not presently exercising the full extent of its water rights. Amici demand that they be awarded all of the water in the Vermejo River in part for future uses, and in part to avoid having to more reasonably use the water which they now divert.

The Amici Brief at pages 21, 22 and 23 purports to analyze *Nebraska v. Wyoming* in light of the several factors mentioned in that case as being relevant to equitable apportionment considerations. They would conclude that none of the specific factors mentioned are relevant to the case at bar, and that the allocation of Vermejo River water should be on the basis of priority dates. Without doubt, four of those factors are most pertinent equitable considerations in the case at bar:

1. The "extent of established uses" is relevant in relation to the claims of the Amici that they should be recognized as having established uses on the Vermejo requiring the full amount of their decreed rights. As discussed herein, Amici's "established uses" employ much less water than the full amount of Amici's decreed rights. Their *actual* usage is protected by the Special Master's Report.

2. The "availability of storage water" is also very relevant. Storage of water is at the heart of any conservancy district project, and is the means by which the Vermejo Conservancy District deals with the dependable supply matter which Amici emphasize. The District's ability to capture and store water from month to month and year to year means it is not primarily dependent upon the direct flow of the Vermejo for its immediate water supply. By diverting and storing water during high flow periods, the District can provide for its needs in months of low flow. Similarly, the ability to store water over an extended period gives the District an additional supply which it can use to offset any Colorado diversions. The District, unlike any other user in New Mexico, can capture the high runoff from snowmelt or from thunderstorms, store that water and use it during drier periods. Because the District can store water in a manner to prevent injury, it would be inequitable not to consider these storage facilities.

3. Another factor mentioned in *Nebraska v. Wyoming* is the ". . . effect of wasteful uses on downstream areas." The Amici say that this factor is not relevant because there are no uses in Colorado which affect downstream areas. However, it is clear that what this Court was considering was the impact of wasteful uses, not whether they take place in one state or another. Wasteful uses are very much involved in this case as indicated by the sixty-seven percent loss of water from the Vermejo Conservancy District headgate to the farms and by the great number of water detention dams, stockponds and fishponds which are a major factor on the Vermejo River. The District alone can conserve over 2,000 acre feet per year by installing a closed stockwatering system. Improvements to its canal and reservoir systems, and consolidation of unnecessary stockponds, fishponds and water detention dams would conserve an even greater amount of water without impairing decreed rights on the Vermejo.

4. Finally, a factor mentioned in *Nebraska v. Wyoming* is ". . . damage to upstream areas as compared to the benefits to downstream if a limitation is imposed on the former." Here again the main consideration is the matter of benefits and damage to particular areas resulting from the allocation of water from an interstate stream. The Special Master specifically engaged in such an analysis, finding ". . . that the injury to New Mexico, if any, will be more than offset by the benefit to Colorado." (Report, p. 23). As this Court held in *Nebraska v. Wyoming*, the Special Master concluded that the principle of priority of appropriation should not be strictly adhered to in the case at bar because of "[c]ountervailing equities in favor of Colorado."

Concluding its discussion of the case, the Amici Brief recognizes that the listing of factors in *Nebraska v. Wyoming* "is not exhaustive" and then purports to give the exclusive list of other factors. The extensive evidence presented in this case is filled with many factors which the Special Master no doubt considered in relation to the equities and which would be accepted under the philosophy of *Nebraska v. Wyoming*, which really teaches that *all* factors bearing on the equities are to be considered.

What the Special Master did was to look behind New Mexico's argument that decreed rights are the measure of usage in New Mexico. He evaluated actual usage and compared that usage with available water. What he concluded was that "downstream users" and "existing economies" could be satisfied and Colorado could be given its equitable share of the Vermejo River system. His recommendations are based upon an evaluation of the actual facts and support his conclusion ". . . that a transmountain diversion [in Colorado] would not materially affect the appropriations granted by New Mexico for users downstream." (Report, p. 23.)

IV. EVIDENCE IGNORED BY AMICI

In their Brief, Amici rely for their case on virtually one document dated and reflecting conditions in 1941. This document is a water adjudication decree for the Vermejo River (Colo. Ex. 25) which shows the rights and uses of various appropriators of water as of that date. Attempting to confine the consideration of equities along the Vermejo River solely to the paper rights claimed to derive from this one document, Amici deliberately ignore important evidence of developments since 1941 and the current conditions. What the Amici seek to achieve is obvious. They seek to place ahead of any claim by Colorado possible future uses in New Mexico based on the volumes set forth in the 1941 decree.

Basic evidence in the record which is ignored by Amici is the following:

1. New Mexico's Exhibit E-3, the Dennis Engineering Report, establishes that 2,000 acre feet of water could be saved annually by a closed stockwater system. Not one reference to this exhibit or to the testimony in regard thereto appears in the Amici Brief, nor is there any discussion of the significant water losses which occur through the present stockwater system.

When this document, E-3, is coupled with the testimoney of New Mexico's chief witness, Mr. Mutz, that the Colorado "diversion would be essentially felt in its entirety" by the District (Tr. 1323) and the testimony of the same witness as to the losses of water from seepage and evaporation which can be curtailed (Tr. 1280, 1285, 1286, 1297, 1315, 1318), it establishes beyond question that any injury to New Mexico by the Colorado diversion could be prevented by proper conservation measures.

The facts developed by New Mexico's Exhibit E-3 are that over 2,000 acre feet of water are lost through evaporation or seepage by the method of providing stockwater in the wintertime through open canals. In view of the fact that only approximately one-third of the water diverted from the Vermejo River by the District reaches the farms, a saving of 2,000 acre feet in the stockwater system would be equivalent to a much larger amount of water taken from the River (Colo. Reply Brief, p. 52; Colo. Ex. 70; N.M. Exs. D-2, F-21 Revised, F-29, F-37).[5]

2. Ignoring the evidence to the effect that the injury to the Vermejo Conservancy District could be prevented, the Amici avoid dealing with the evidence showing that the uses of Phelps-Dodge Corporation, Kaiser Steel Corporation and Vermejo Park Corporation would not be significantly affected by the diversions by Colorado of 4,000 acre feet allocated by the Special Master. We will discuss this evidence in relation to each one of these corporations.

A. Phelps-Dodge Corporation

The fact that Phelps-Dodge is now irrigating no more than 150 acres, and probably less than that, is due not to any shortage of water available for its first priority on the River but rather to its own choice. Under the water allocations on the Vermejo River, each user is entitled to two acre feet of water for one acre to be irrigated, with the exception of the Vermejo Conservancy District which is entitled to only 1.5 acre feet of water per acre irrigated (Colo. Ex. 25). The public records of the monthly flows at the Dawson gauge, just above the Phelps-Dodge diversion point, show volumes so far in

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[5]The loss is due to seepage and evaporation in the diversion structures from the River to the reservoirs, in the reservoirs themselves and in the canals from the reservoirs to the fields.

excess of the amounts to which Phelps-Dodge would be entitled that there can be no question about water availability (Colo. Ex. 5, Tbl. 2). These figures nullify any claim that there has not been a dependable supply during the critical irrigation months.

Phelps-Dodge also leased 400 acre feet per year of its water to Kaiser (Tr. 1722; Colo. Ex. 51). This is irrefutable evidence that Phelps-Dodge had more than enough water to irrigate its acreage. Its posture of leasing away 400 acre feet of its water and then contending that it didn't have the 300 acre feet for its 150 acres is duplicitous.

Several New Mexico witnesses indicated that one reason Phelps-Dodge wasn't irrigating any more acreage was because of the failure of Phelps-Dodge to maintain its irrigation system (Tr. 2145, 2164, 2175). Thus, Phelps-Dodge appears to be seeking to hold the major portion of its paper right for some future use.

The Amici Brief at page 4 says that Phelps-Dodge has called upon the Vermejo Park Corporation to reduce its upstream diversions, but cites no transcript reference. There is no evidence that the Phelps-Dodge Corporation ever had less water than it was entitled to at its diversion point under its first priority. New Mexico's own Exhibit A-130, a U.S.G.S. experimental one-month seepage run, shows Phelps-Dodge taking approximately all the water to which it would be entitled on a yearly basis, i.e., 300 acre feet, during a one-month period from the middle of September to the middle of October, 1980. Mr. Davis, the manager of the Phelps-Dodge lessee, testified that there is no measurement of the water they take (Tr. 2168). Mr. Spencer, the general manager of the Vermejo Conservancy District, stated that actually Phelps-Dodge was irrigating no more than 80 acres (Knox Dep., p. 54).

That part of the Phelps-Dodge priority which has not been used for many years is subject to being declared forfeited or abandoned. New Mexico has a statute which provides for forfeiture if a water right has not been used for four years. 72-5-78, N.M.S.A. 1978. The testimony of the New Mexico officials is that they have undertaken no administration of water on the Vermejo River nor have they even undertaken to declare forfeitures or abandonments (Tr. 1088, 2422, 2423). New Mexico, at page 27 of its Brief before this Court, admits that Phelps-Dodge leased 400 acre feet of its water rights to Kaiser Steel Corporation "to avoid any possibility that the rights would be forfeited under New Mexico law." Colorado, and apparently the Special Master, do not believe that it is equitable to require Colorado to pass water when that water would likely not be applied to a beneficial use. New Mexico's Supreme Court likewise has stated that an upstream junior appropriator need not pass water to a downstream senior and may use water out of priority when the downstream senior appropriator is not beneficially using that water. *Worley v. United States Borax and Chemical Corp.*, 78 N.M. 112, 428 P.2d 651, 654 (1967).

Thus, the Phelps-Dodge claim that there was not enough water in the river to fulfill its first priority is completely untenable (Tr. 1078, 1079, 1085). Its present use is designed to obscure the fact that all or the major part of its water right has been abandoned. Any claim by Phelps-Dodge for all the water decreed under the 1941 decree would be a claim for future use. This is contrasted with the specific needs and uses presented by Colorado which established the "countervailing equities" recognized by the Special Master (Report, p. 23).

B. Kaiser Steel Corporation

The Kaiser use is a new use (Tr. 1105, 2437) coupled with an unlikely future use. The evidence shows that although Kaiser claims 230 acre feet of water by

purchase and 400 acre feet of water by lease from Phelps-Dodge, for a total of 630 acre feet, its maximum use was 361 acre feet in 1976, with the amount of use since that date decreasing (Tr. 1725). The priorities of the Kaiser rights are either the first priority under the lease from Phelps-Dodge or priorities senior to the Vermejo Conservancy District under its purchased rights. The Amici Brief claims that Kaiser has made demands upon the Vermejo Park Corporation to cease or reduce its diversions from the River, but cites no evidence in support. The facts are that Kaiser has had all of the water that it required for its use and is uncertain if all of those rights will be used in the future (Tr. 1727). Finally, Mr. Mutz, the New Mexico witness, testified that Colorado diversions would not significantly affect Kaiser (Tr. 1323, 1379).

C. The Vermejo Park Corporation

Mr. Reynolds, the new Mexico State Engineer, testified that Vermejo Park Corporation could have irrigated more than it has in recent years (Tr. 2427). The use of the water by this corporation is ancillary to the recreational hunting and fishing activities which are its primary purpose (Tr. 2064-67, 2108, 2109). However, it claims to have irrigated much more acreage in the 1960's than in the 1970's with the reduction due to what New Mexico has called a "severe drought." Colorado demonstrated in its Reply Brief that New Mexico's own exhibit (F-37) shows that the Vermejo Conservancy District irrigated nearly as much acreage in the 1970's as it did in the 1960's, thereby refuting any contention that the Vermejo Park Corporation could not have irrigated more than 250 acres. During the 1970's, the Vermejo Conservancy District was able to irrigate over 4,000 acres on a yearly basis (N.M. Ex. F-37). It is therefore incredible that Vermejo Park would claim that it, with a priority senior to the District, could not irrigate more than 250 acres. With an average of at least 8,400 acre feet of water passing the Colorado line annually in

the Vermejo River system, and Vermejo Park being the first appropriator below the Colorado state line, it is absurd to argue that Vermejo Park experienced a water shortage for its irrigation rights.

Again, with respect to this water right, a situation exists which would justify a declaration of forfeiture. That portion of the water right which has not been used for over four years could be subject to the New Mexico forfeiture statute, a statute which is not apparently enforced on the Vermejo River (Tr. 1088, 2425). 72-5-28, N.M.S.A. 1978. Any claim by Vermejo Park Corporation for any water over and above that necessary to irrigate 250 acres would be for future use under an abandoned water right.

The Special Master concluded that even after the Colorado diversion, Phelps-Dodge, Kaiser and the Vermejo Park Corporation would have enough water to meet their needs. He stated:

> The Master is of the opinion that the evidence presented demonstrates that sufficient water is available for Vermejo Park Corporation, Kaiser Steel and Phelps-Dodge. The flows at the Dawson Gauge indicate sufficient water to meet the needs of all three corporations regardless of which State's figures are used.

Report, p. 23.

3. Also completely ignored by Amici and by New Mexico are the water detention dams, fishponds and stockponds mentioned time and again in Bureau of Reclamation documents as the primary cause of the water shortage of the Vermejo Conservancy District (Colo. Exs. 37, 38, 40, 43, 44, 45, 48). These are among the developments since 1941 and among the current conditions which Amici would like to ignore by their reliance solely on the 1941 decree, but which have a

major bearing on the equities in this case. These dams and ponds are not regulated in the priority system, can deplete the River without restriction (72-9-3, N.M.S.A. 1978) and can be constructed at any time. Their existence belies claims that New Mexico's "water shortage" is due to drought. These ponds are not regulated by New Mexico in the priority system.

4. Amici would like to ignore completely the present irrigation practices and conditions of the Vermejo Conservancy District, a situation which was foreseen by President Truman when he signed the legislation for the Bureau of Reclamation project and referred to it as a "rescue operation" (Tr. 1560). Amici would have the project judged on the basis of the studies and reports that were made prior to its inception (N.M. Ex. C-2) ignoring the fact that the previous entity, the Maxwell Irrigation Company, had gone bankrupt (Colo. Ex. 34) and ignoring the fact testified to by Bureau witnesses that if the project were being considered today it would not be built. Mr. Weimer, the Bureau of Reclamation witness, stated as follows: "Based on current understanding of hydrology and based on current policy within the Department of Interior, I would make the statement even stronger than that. That if the project was being studied today, that it would not have been built." (Tr. 1586). The statement to which Mr. Weimer referred is one appearing in a letter dated September 26, 1978, of the Acting Assistant Secretary of the Department of the Interior wherein he said that "this project probably should not have been authorized" and that it was "evidence of the need for a more sound approach to evaluating and authorizing projects." (Colo. Ex. 46). The Vermejo Conservancy District board of directors wrote to Mr. Weimer, Regional Director of the Bureau of Reclamation, under date of January 9, 1979, saying, "Our second request was simply to have the debt written off. Since it is obvious that it can never be repaid or the project funded to make it possible." (Colo. Ex. 47). Thus, while the District should receive its fair share of

Vermejo River water, neither it nor the other Amici should be allowed to inflate their needs or disguise their uses to depict a situation which does not exist. Again, it is a matter of fairness.

5. In the first paragraph of their Brief, the Amici dramatically refer to the Vermejo as a "puny river" but say that it is "the lifeblood of Colfax County, New Mexico." If indeed this river is so vital, the neglect with which it is treated by the New Mexico water officials and the water users in New Mexico is inexcusable. This neglect is completely ignored by the Amici in their Brief, although it was the subject of significant evidence before the Special Master.

The New Mexico water officials make no effort to attempt to determine whether or not the proper amount of water is being diverted by particular water claimants (Tr. 987, 1071, 1098-1101, 1863, 1864, 1881, 1967-69, 2434). They make no effort to declare forfeitures of all or parts of water rights although such would be in accord with proper administration of water in the priority system, and would be very much in the interests of certain water users themselves (Tr. 1088, 2422, 2423).

As indicated above, the proliferating water detention dams, fishponds and stockwater ponds have become a major factor affecting the District's water supply (Colo. Exs. 37, 38, 40, 43, 44, 45, 48). There is no evidence in the record that any of the Vermejo River water users or officials, in an attempt to protect their "lifeblood," have sought to do anything about this situation and the Amici Brief completely ignores it.

It is acknowledged on all sides that only about one-third of the water diverted from the Vermejo River by the Vermejo Conservancy District reaches its farms (Colo. Exs. 69 and 70; Tr. 1280, 1286, 1315). In other words, two-thirds of the "lifeblood" is lost through seepage or evaporation. As indicated by the Bureau

documents, the canals and diversion structures are allowed to become "clogged with debris" and the long supply canals in medium grade have a "high seepage loss and heavy silting" (Colo. Exs. 37, 44). The District, like all users along the Vermejo, must do its share to conserve the common supply. *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922).

The fact that the Amici do not deal with these factors which so affect the actual water availability in New Mexico would indicate that they would like to have conditions remain as they are without regard to the benefits that could be achieved through proper water management and conservation measures.

Certainly these are among the factors which were considered by the Special Master in his evaluation of the equities of the case. They support his conclusion that it would not be equitable to deny Colorado a portion of the water it produces for the Vermejo River simply to permit continued uncontrolled, unadministered and wasteful use in New Mexico.

6. In their plea that the Vermejo is a ". . . New Mexico river" (Amici Brief, p. 25), the Amici would ignore the fact that practically every river which originates in Colorado has a shorter distance in Colorado than in the other state or states into which it flows. For example, the North Platte River which was involved in *Wyoming v. Colorado* and in *Nebraska v. Wyoming* has a much shorter distance in Colorado than in the other states. So, also, do the Republican River, the South Platte River, the Arkansas River, the Colorado River, the Yampa River, etc.

No interstate compact and no decision of this or any court has suggested that the distance of flow in a particular state should control the amount of water that is allocated to the state.

CONCLUSION

It is one thing to make a case on the basis of an analysis of the evidence presented, arguing that it leads to a particular conclusion. It is quite a different thing to make a case by ignoring basic evidence and criticizing the trier of fact, who did consider that evidence.[6] Colorado believes the record speaks for itself, and belies Amici's criticism of the Special Master and the Report.

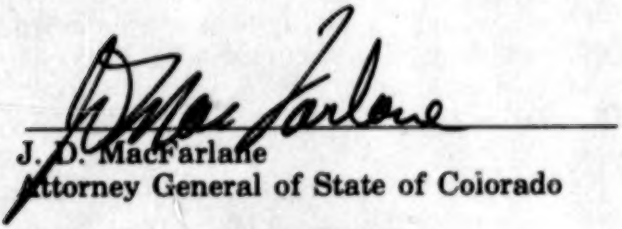
The record in this case is complete. The testimony of all witnesses that either side wanted to present was taken in an atmosphere of deliberation without pressures of time or otherwise. The documents were submitted after discovery procedures and any relevant exhibit or testimony either side wished to offer was accepted. A review of the record will show the thoroughness with which the Special Master conducted the trial and the wisdom of his analysis of the facts and the law. The record fully supports the Special Master's Report in light of the equitable apportionment principles established by this Court and his ruling should be upheld.

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[6]E.g., Amici Brief: the Special Master "totally misconceived," page 8; "the Special Master astonishingly and with great illogic," page 11; the Special Master's "lack of comprehension," page 12; "the Special Master started out on the wrong foot," page 16; "the Special Master misperceived," page 16; "the Special Master compounded the error," page 17; "the Special Master has completely ignored," page 17.

Respectfully submitted,

STATE OF COLORADO



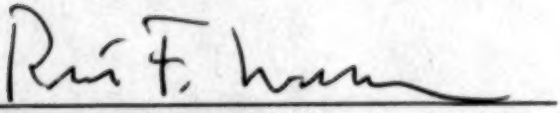
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CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am a member of the bar of this Court and counsel of record for the plaintiff and that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing The State of Colorado's Reply to Brief of Amici Curiae, by first class mail, postage prepaid, to the following officials of the State of New Mexico:

The Honorable Bruce King
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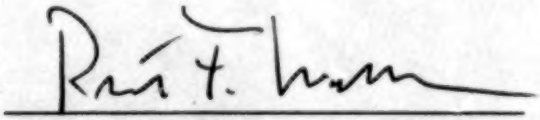
I certify that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Federal Express the requisite number of copies of the foregoing The State of Colorado's Reply to Brief of Amici Curiae on the following counsel of record:

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